IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 213 OF 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

==========

MUKUNDRAI HARILAL PARIKH - Appellant(s)
Versus
SHIVABHAI CHATURBHAI PATEL & ANR. - Respondent(s)

==========

Appearance :
MR. SHALIN MEHTA for Appellant(s).
MR. NIRAD D. BUCH for MR. N.D. NANAVATI for Respondent(s).

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 20/12/2006

ORAL JUDGMENT

1. The present appeal has been admitted for hearing the parties on the following substantial questions of law:

“(1) Whether there is a bar of res judicata or

principles analogous to res judicata against the respondent in view of the fact that he has not preferred F.A. against the decision in Civil Suit No.157/79?

(2) Whether the resignation of the appellant was rightly accepted by the Municipality? If yes, whether the respondent-Municipality has committed an illegality or has acted in violation of Art.14 and 16 of the Constitution in permitting appellant-deft. No.2 to withdraw the resignation and to reinstate him in service?

(3) Whether the plaintiff-respondent No.1 had any right to challenge acceptance of the withdrawal of the resignation by the resp. Municipality and reinstatement of the appellant?"

2. The short facts necessary for disposal of the present appeal are that the present appellant, Mukundrai Harilal Parikh was working as a Tax Superintendent in the Municipality. In view of serious complaints made against him, a charge-sheet was issued, but, instead of giving reply to the charge-sheet, the said Mukundrai Harilal Parikh (present appellant – original defendant No.2) submitted his resignation. The resignation was ultimately accepted and the present appellant was removed from the services. Thereafter, the plaintiff - Shivabhai Chaturbhai Patel (present respondent No.1), who was working as a Tax Clerk, was promoted to the post of Tax Superintendent. It appears from the records that the

present appellant - Mukundrai made certain applications to the Municipality to permit him to withdraw the resignation. The President of the Municipality asked for the legal opinion and also required the Chief Municipal Officer to submit his report. The Chief Municipal Officer, however, submitted that in view of unconditional acceptance of the resignation, the present appellant could not be allowed to withdraw the resignation. However, the present appellant continued persuading the authority. In view of the continuous and constant persuasion by the present appellant, the Municipality issued an order of appointment in favour of the present appellant to occupy the post of Tax Superintendent. As a result of the said appointment, the present plaintiff was to suffer a demotion, therefore, he filed a suit before the learned Civil Judge (S.D.), Amreli and prayed for an injunction and declaration. *Ad interim* order was granted in his favour, but, ultimately, the Court held that the suit filed by the present plaintiff was not maintainable in view of non-issuance of the statutory notice. The present plaintiff was allowed to withdraw his earlier suit with liberty to file a fresh suit after complying with the legal requirements.

2.1 It is to be seen that after filing of the first suit by the present plaintiff, the Municipality had

issued an order suspending the effect of the second appointment of the present appellant. Being aggrieved by the said order, the present appellant filed Civil Suit No.157 of 1979. In the said suit, the present appellant had prayed that the impugned order dated 2nd September, 1979, suspending the services of the plaintiff, be declared to be illegal and without jurisdiction and also prayed for a permanent injunction restraining the defendants from obstructing the plaintiff from performing his duty. The said Civil Suit No.157 of 1979 was finally decided by the learned Civil Judge (S.D.), Amreli on 21st October, 1982, and it was declared by the said Court that the impugned order passed by defendant No.1 (Amreli Nagarpalika) bearing No.1502 on 2nd September, 1979, suspending the plaintiff's services was illegal, without jurisdiction and against the principles of natural justice. The said court also granted permanent injunction against the Municipality, its agents and employees restraining them from obstructing the plaintiff in performing his duty as Tax Superintendent.

2.2 It is not in dispute before me that the present plaintiff, Shivabhai Chaturbhai Patel, was defendant No.2 in the said suit. It is also not in dispute before me that the said judgement and decree made in Regular Civil Suit No.157 of 1979 (Exh.56) were not challenged by any

party before any higher forum and have attained finality.

2.3 The present plaintiff, after withdrawal of his suit, filed yet another Regular Civil Suit No.264 of 1979 in the Court of the learned Civil Judge (S.D.), Amreli against Amreli Nagarpalika and Maganbhai (present appellant). The suit was dismissed on 21st October, 1982. Probably on the same date, when the suit filed by the present appellant was decreed by the said Court, the present plaintiff filed an appeal against the dismissal of his suit, but, did not challenge the decree made in Regular Civil Suit No.157 of 1979. The learned first Appellate Court, *vide* its judgement dated 24th July, 1986 in Civil Regular Appeal No.152 of 1982, allowed the appeal and decreed the suit holding, *inter alia*, that Resolution No.42 passed by the General Board of Amreli Nagarpalika on 30th July, 1979 and Order No.1458 dated 31st July, 1979 were against the provisions of law, illegal, unconstitutional and were not binding upon the plaintiff. The learned Appellate Court also directed the Nagarpalika not to remove the plaintiff from the post of the Tax Superintendent until a new Tax Superintendent was appointed in accordance with law, rules or by the Staff Selection Committee.

2.4 The present appellant/defendant No.2, being

aggrieved by the said judgement and decree, is now before this Court.

3. Shri Shalin Mehta, learned Counsel for the appellant-defendant, vehemently contended that between the parties, the decision in Civil Suit No.157 of 1979 (wherein the appellant was the plaintiff) would operate as *res judicata* and so long as the said judgement stands, no other Court could grant any relief in favour of the present plaintiff. He also submitted that the learned first Appellate Court was unnecessarily influenced by the fact that the present appellant was seeking permission to withdraw his earlier resignation. His submission is that once the fact was proved before the learned Appellate Court that the plaintiff was not reinstated, nor was allowed to withdraw the resignation, but, present was a case of fresh appointment, then, the learned Appellate Court should not have expressed its opinion against the Municipality or the present appellant. It is also submitted by him that if the judgement and decree under challenge are allowed to stand, then, the same would create an impossible situation because on one side in execution of the decree passed in Civil Suit No.157 of 1979, the plaintiff would be entitled to occupy the post while on the other hand, in view of the appellate judgement (impugned in this proceeding) the present

plaintiff/respondent No.1 would be authorised to occupy the post. His submission is that in a case like the present where the judgement delivered in favour of the present appellant has attained finality, the suit of the present plaintiff could not be decreed by the learned Appellate Court.

4. Shri Buch, learned Counsel for respondent No.1, plaintiff, however, submits that present is a case of corporate favouritism because it would clearly appear that even after acceptance of the resignation tendered by the present appellant, the President and other Officers of the Municipality were ready and willing to extend their helping hand in favour of the present appellant. His further submission is that withdrawal of the earlier suit filed by the present plaintiff would not come in his way in filing the present suit and the judgement and decree delivered in Civil Suit No.157 of 1979 (wherein the present appellant-defendant was the plaintiff) would not affect the merits of this matter.

5. Undisputedly, the judgement and decree delivered in Civil Suit No.157 of 1979 (where the appellant-defendant was the plaintiff) has not been challenged by any party before any higher forum. The judgement and decree have attained finality and the

relief given in favour of the present appellant has become conclusive. If the present respondent-plaintiff was party defendant in the said suit, then, he was obliged to challenge the said judgement and decree, which were to operate against his right and were conferring certain rights upon the present appellant.

6. Section 11 of the Code of Civil Procedure, 1908 clearly provides that if an issue contested by the parties in the earlier proceedings attains finality, then, in any subsequent proceedings, either between the same parties or their successors, the Court would not allow the said issue to be raised. In the present matter, the present plaintiff, by not challenging the decree granted in favour of the present appellant, lost all his rights because in view of the judgement and decree passed in Regular Civil Suit No.157 of 1979, the order of appointment made in favour of the present appellant would become final and none would be allowed to challenge the same in any other proceedings. The suit of the plaintiff, on the date of its institution, certainly was maintainable, but, after the present appellant's suit was decreed, the present plaintiff was required to challenge the said judgement and decree also. The present plaintiff, having not challenged the judgement and decree in Civil Suit No.157 of 1979, virtually, made his appeal

incompetent.

7. The learned Appellate Court, in the considered opinion of this Court, if was of the opinion that the order made in favour of the present appellant was of a fresh appointment, as is clear from the findings recorded by it, then, it was required to consider the entire case from a different angle. The learned Appellate Court has clearly held that the present appellant's resignation was accepted and in view of the subsequent event, his appointment would be taken to be a fresh appointment. If present was not a case of withdrawal of the resignation or permission to withdraw the resignation, which was earlier accepted, Question Nos.2 and 3 would not survive for consideration.

8. Taking everything into consideration, especially, the factual and legal position, I must hold that the decision made in Civil Suit No.157 of 1979, wherein the plaintiff was the defendant and the present appellant-defendant was the plaintiff, having attained finality would operate as *res judicata* against the interest of the present plaintiff/respondent No.1. Once that position is clear, then, this Court must also hold that the Appellate Court was not authorised to go contrary to the judgement and decree delivered in favour

of the present appellant in his Civil Suit No.157 of 1979. I, accordingly, answer Question No.1 in the favour of the appellant.

9. The judgement and decree passed by the learned first Appellate Court are contrary to law, the same cannot be allowed to stand.

10. The judgement and decree passed by the learned first Appellate Court are set aside and those of the learned trial Court are restored. The suit of the plaintiff stands dismissed. No costs.

Let a decree be framed accordingly.

[R.S.Garg, J.]

*kamlesh**